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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 LARRY SHAW,

7 Plaintiff,

8 v.

9 COMMISSIONER OF SOCIAL

10 SECURITY ADMINISTRATION,

11 Defendant.
12
13
14

No. 1:17-cv-03026-SAB

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

15 Before the Court are Plaintiff Larry Shaw's Motion for Summary Judgment,
16 ECF No. 12, and Defendant Commissioner of the Social Security Administration's
17 Cross-Motion for Summary Judgment, ECF No. 13. The motions were heard
18 without oral argument. Plaintiff is represented by D. James Tree, and Defendant is
19 represented by Assistant United States Attorney Timothy Durkin and Special
20 Assistant United States Attorney Daphne Banay. For the reasons set forth below,
21 the Court **grants** Plaintiff's motion, **denies** Defendant's motion, **reverses** the
22 administrative law judge ("ALJ"), and **remands** for a determination of Social
23 Security payments with an onset date of February 15, 2013.

24 **Jurisdiction**

25 On August 12, 2013, Plaintiff filed an application for supplemental security
26 income disability insurance benefits. Plaintiff alleges an onset date of August 1,
27 2012.

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1 Plaintiff's application was denied initially and on reconsideration.
2 Thereafter, Plaintiff amended his alleged onset date to February 15, 2013. On
3 February 23, 2015, Plaintiff appeared and testified at a hearing held in Yakima,
4 Washington before ALJ Virginia Robinson. The ALJ issued a decision on July 20,
5 2015, finding that Plaintiff was not disabled. Plaintiff timely requested review by
6 the Appeals Council, which denied the request on December 13, 2016. The
7 Appeals Council's denial of review makes the ALJ's decision the final decision of
8 the Commissioner.

9 Plaintiff filed a timely appeal with the United States District Court for the
10 Eastern District of Washington on February 13, 2017. The matter is before this
11 Court under 42 U.S.C. § 405(g).

12 Sequential Evaluation Process

13 The Social Security Act defines disability as the "inability to engage in any
14 substantial gainful activity by reason of any medically determinable physical or
15 mental impairment which can be expected to result in death or which has lasted or
16 can be expected to last for a continuous period of not less than twelve months."

17 42 U.S.C. § 1382c(a)(3)(A). A claimant shall be determined to be under a
18 disability only if his impairments are of such severity that the claimant is not only
19 unable to do his previous work, but cannot, considering claimant's age, education,
20 and work experiences, engage in any other substantial gainful work which exists
21 in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

22 The Commissioner has established a five-step sequential evaluation process
23 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*
24 *Yuckert*, 482 U.S. 137, 140-42 (1987).

25 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
26 § 416.920(b). Substantial gainful activity is work done for pay and requires
27 compensation above the statutory minimum. *Id.*; *Keyes v. Sullivan*, 894 F.2d 1053,
28 1057 (9th Cir. 1990). If the claimant is engaged in substantial activity, benefits are

1 denied. 20 C.F.R. § 416.971. If he is not, the ALJ proceeds to step two.

2 Step 2: Does the claimant have a medically-severe impairment or
3 combination of impairments? 20 C.F.R. § 416.920(c). If the claimant does not
4 have a severe impairment or combination of impairments, the disability claim is
5 denied. A severe impairment is one that lasted or must be expected to last for at
6 least twelve months and must be proven through objective medical evidence. 20
7 C.F.R. § 416.908-.909. If the impairment is severe, the evaluation proceeds to the
8 third step.

9 Step 3: Does the claimant's impairment meet or equal one of the listed
10 impairments acknowledged by the Commissioner to be so severe as to preclude
11 substantial gainful activity? 20 C.F.R. § 416.920(d); 20 C.F.R. § 404 Subpt. P.
12 App. 1. If the impairment meets or equals one of the listed impairments, the
13 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
14 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

15 Before considering Step 4, the ALJ must first determine the claimant's
16 residual functional capacity. 20 C.F.R. § 416.920(e). An individual's residual
17 functional capacity is his ability to do physical and mental work activities on a
18 sustained basis despite limitations from his impairments.

19 Step 4: Does the impairment prevent the claimant from performing work he
20 has performed in the past? 20 C.F.R. § 416.920(f). If the claimant is able to
21 perform his previous work, he is not disabled. *Id.* If the claimant cannot perform
22 this work, the evaluation proceeds to the fifth and final step.

23 Step 5: Is the claimant able to perform other work in the national economy
24 in view of his age, education, and work experience? 20 C.F.R. § 416.920(g).

25 The initial burden of proof rests upon the claimant to establish a prima facie
26 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
27 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
28 mental impairment prevents him from engaging in his previous occupation. *Id.* At

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1 step five, the burden shifts to the Commissioner to show that the claimant can
2 perform other substantial gainful activity. *Id.*

3 **Standard of Review**

4 The Commissioner's determination will be set aside only when the ALJ's
5 findings are based on legal error or are not supported by substantial evidence in
6 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
7 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
8 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
9 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
10 evidence is "such relevant evidence as a reasonable mind might accept as adequate
11 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
12 ALJ's denial of benefits if the evidence is susceptible to more than one rational
13 interpretation, one of which supports the decision of the administrative law judge.
14 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court reviews the
15 entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If the evidence
16 can support either outcome, the court may not substitute its judgment for that of
17 the ALJ." *Matney*, 981 F.2d at 1019.

18 A decision supported by substantial evidence will be set aside if the proper
19 legal standards were not applied in weighing the evidence and making the decision.
20 *Brawner v. Sec'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
21 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the
22 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
23 1050, 1055 (9th Cir. 2006).

24 **Statement of Facts**

25 The facts have been presented in the administrative transcript, the ALJ's
26 decision, and the briefs to this Court; only the most relevant facts are summarized
27 here. At the time of the hearing, Plaintiff was forty-six years old. Plaintiff has a
28 ninth-grade education and previously worked as a ranch hand and a mason.

1 Plaintiff testified that he began experiencing severe back pain in 2001 while
2 working as a mason. His back pain worsened over time. Plaintiff cannot be on his
3 feet for long as it causes pain into his hip; it feels like sand bags are weighing him
4 down. When he sits his legs and knee caps become numb so he must lay down
5 with his legs elevated; it takes approximately thirty minutes for him to stand back
6 up. During an eleven-hour period, Plaintiff must lay down and elevate his legs for
7 five or six hours. He is able to do household chores and care for his horses with
8 frequent breaks.

9 In February 2013, Plaintiff's treating physician Dr. Jeremiah Crank, M.D.,
10 found that Plaintiff had positive straight leg testing when sitting and supine, his
11 cervical spine was tender with mildly reduced range of motion, and crepitus was
12 present. Dr. Crank opined that Plaintiff was severely limited and unable to meet
13 the demands of sedentary work. In April 2013, imaging revealed multilevel
14 degenerative disc disease and degenerative facet arthrosis of the lower lumbar
15 spine and spondylosis of the thoracolumbar spine. James Bailey, PhD, found
16 Plaintiff disabled as of September 1, 2012 under the Department of Social and
17 Health Services standard; Plaintiff testified that he receives \$197 per month from
18 the Department.

19 Plaintiff also testified that he has auditory hallucinations, hearing people
20 talking to him that are not visually present. He also will see people out of the
21 corner of his eye that are not physically there. The hallucinations began in June of
22 2012 and makes it difficult to concentrate. Plaintiff is taking medication for his
23 hallucinations, but he still hears voices. Plaintiff also suffers from depression. In
24 February 2013, Aaron Burdge, Ph.D, opined that Plaintiff's test results suggest a
25 person with significant thinking and concentration problems, accompanied by
26 agitation and distress. He is likely to be withdrawn and isolated and his social
27 judgment is probably fairly poor. Plaintiff is likely to have difficulty making
28 decisions, even about matters of little apparent significance.

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The ALJ's Findings

At step one, the ALJ found Plaintiff has not engaged in substantial gainful activity since August 12, 2013. AR 24.

At step two, the ALJ found Plaintiff has the following severe impairments: degenerative disc disease of the cervical and lumbar spine, hypertension, and gastroesophageal reflux disease ("GERD"). AR 24.

At step three, the ALJ found that Plaintiff's impairments or combination of impairments do not meet or medically equal any Listing. AR 27.

The ALJ concluded that Plaintiff has the residual functional capacity to perform

A reduced range of light work as defined in 20 CFR 416.967(b). Specifically, the claimant can lift or carry up to 20 pounds occasionally and up to 10 pounds frequently, stand or walk for approximately 6 hours and sit for approximately 6 hours per 8-hour workday with normal breaks; occasionally climb ramps or stairs; never climb ladders, ropes, or scaffolds; occasionally stoop, kneel, crouch, and crawl; should avoid concentrated exposure to pulmonary irritants and work place hazards such as dangerous machinery or working at unprotected heights.

AR. 28. At step four, the ALJ found that Plaintiff is incapable of performing any past relevant work. AR 31.

At step five, the ALJ found Plaintiff was not disabled on the basis that he could perform other work which exists in significant numbers in the national economy, including positions such as production assembler, cashier, and housekeeper. AR 32.

Issues for Review

1. Whether the ALJ committed reversible error by improperly considering the medical opinion testimony;
2. Whether the ALJ committed reversible error by discrediting Plaintiff;

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1 3. Whether the ALJ committed reversible error by failing to consider Plaintiff's
2 mental impairments and obesity as medically-determinable severe impairments.

3 **Discussion**

4 *1. Whether the ALJ committed reversible error by improperly considering the*
5 *medical opinion testimony.*

6 The ALJ is tasked with resolving conflicts in the medical evidence. *Andrews*
7 *v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Generally speaking, three types of
8 doctors provide medical evidence: treating doctors, examining doctors, and
9 reviewing (non-examining) doctors. "By rule the Social Security Administration
10 favors the opinion of a treating physician over non-treating physicians." 20 C.F.R.
11 § 416.927¹; *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). "If a treating
12 physician's opinion is well-supported by medically acceptable clinical and
13 laboratory diagnostic techniques and is not inconsistent with the other substantial
14 evidence in the case record, it will be given controlling weight." *Orn*, 495 F.3d at
15 631. If a treating physician's opinion is not given "controlling weight" because it
16 does not meet these requirements, the ALJ should consider (i) the length of the
17 treatment relationship and the frequency of examination by the treating physician;
18 and (ii) the nature and extent of the treatment relationship between the patient and
19 the treating physician in determining the weight it will be given. *Id.* "[A]n ALJ
20 errs when he rejects a medical opinion or assigns it little weight while doing
21 _____

22 ¹ 20 C.F.R. § 416.927(c)(2) states: Generally, we give more weight to opinions
23 from your treating sources, since these sources are likely to be the medical
24 professionals most able to provide a detailed, longitudinal picture of your medical
25 impairment(s) and may bring a unique perspective to the medical evidence that
26 cannot be obtained from the objective medical findings alone or from reports of
27 individual examinations, such as consultative examinations or brief
28 hospitalizations.

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1 nothing more than ignoring it, asserting without explanation that another medical
2 opinion is more persuasive, or criticizing it with boilerplate language that fails to
3 offer a substantive basis for his conclusion.” *Garrison v. Colvin*, 759 F.3d 995,
4 1012–13 (9th Cir. 2014) (citing *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir.
5 1996)).

6 a. Jeremiah Crank, M.D.

7 Dr. Crank is Plaintiff’s treating physician. In February 2013, Dr. Crank
8 conducted a physical evaluation and diagnosed Plaintiff lower back pain with
9 radiation to right buttock and episodic lower leg numbness with concern for
10 herniated disc/nerve impingement; neck and upper back pain with occasional
11 numbness; depression and hallucinations; hypertension; and polyuria, likely BPH.
12 He opined that Plaintiff had moderate limitations with regard to sitting, standing,
13 walking, lifting, carrying, handling, pushing, pulling, reaching, stooping, and
14 crouching due to his back and neck pain. Moderate limitations are defined as
15 significant interference with the ability to perform one or more basic work-related
16 activities. AR 255. Accordingly, Dr. Crank opined that Plaintiff was severely
17 limited and unable to meet the demands of sedentary work.

18 In the opinion, the ALJ gave Dr. Crank’s opinion “little weight.”
19 Specifically, the ALJ discounted Dr. Crank’s opinion as inconsistent with the
20 objective findings and observations by him and Plaintiff’s other treatment
21 providers and “admittedly” based in large part on Plaintiff’s subjective reports.
22 The ALJ also noted that “[w]hile there are some objective findings consistent with
23 Dr. Crank’s tentative diagnoses, those findings do not support the degree of
24 functional limitation proffered.” AR 30.

25 Instead of giving controlling weight to Dr. Crank’s medical opinion as
26 Plaintiff’s treating physician, the ALJ credited the opinion of Gordon Hale, M.D.,
27 a consultative evaluator, with great weight. AR 30. In December 2013, Dr. Hale
28 reviewed Plaintiff’s file noting severe impairments of disorders of back-discogenic

1 and degenerative; essential hypertension; other disorders of gastrointestinal system;
2 substance addition disorder; and a non-severe affective disorder. AR 88. Dr. Hale
3 opined that Plaintiff would be limited to light work. Specifically, Plaintiff could
4 lift up to twenty pounds occasionally and ten pounds frequently; stand and walk
5 six hours in an eight-hour day; sit six hours in an eight hour day; and had no
6 pushing or pulling limitations. He further opined that Plaintiff could frequently
7 climb ramps and stairs, climb ladders, balance, stoop, kneel, crouch, and crawl. He
8 advised the Plaintiff should avoid concentrated exposure to workplace hazards
9 such as running machinery and unprotected heights. AR 90-91. The ALJ gave Dr.
10 Hale's opinion great weight as generally consistent with the physical examinations
11 and course of treatment evidenced in the medical records. AR 30.

12 In the opinion, the ALJ did not lay out the standard for discounting the
13 opinion of a treating physician; nor does the ALJ explain why examining
14 physician Dr. Hale's opinion is more persuasive than Dr. Crank's. Where the ALJ
15 finds that a treating physician's opinion is contradicted, the ALJ must provide
16 "specific and legitimate reasons that are supported by substantial evidence."
17 *Garrison*, 759 F.3d at 1012 (9th Cir. 2014). The ALJ can satisfy this requirement
18 by "setting out a detailed and thorough summary of the facts and conflicting
19 clinical evidence, stating his interpretation thereof, and making findings." *Id.*
20 (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)). "The ALJ must do
21 more than state conclusions. He must set forth his own interpretations and explain
22 why they, rather than the doctors', are correct." *Id.* (quoting *Reddick*, 157 F.3d at
23 725).

24 Here, the ALJ merely stated that Dr. Crank's opinion was inconsistent with
25 the objective findings and his diagnoses did not support the degree of functional
26 limitation proffered. The ALJ pointed to no evidence in the record that specifically
27 contradicted Dr. Crank's opinion and failed to set out a thorough summary of the
28 facts and conflicting evidence; no findings were made. This failure was error.

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1 Furthermore, the ALJ stated, without explanation, that Dr. Crank’s opinion was
2 “admittedly” based in large part on Plaintiff’s self-report. AR 30. The Court finds
3 no admission in the record. To the contrary, while Dr. Crank noted Plaintiff’s self-
4 reported symptoms, there is no indication that he relied more heavily on self-
5 reports than objective medical evidence. Dr. Crank performed his own physical
6 examinations, ordered and examined x-rays and MRIs, and prescribed Plaintiff
7 medication. The Court is satisfied that Dr. Crank did not rely more heavily on
8 Plaintiff’s self-reports than clinical observations, and his opinion was improperly
9 discounted. *See Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).

10 Moreover, Dr. Crank’s opinion is “well-supported by medically acceptable
11 clinical and laboratory diagnostic techniques and is not inconsistent with the other
12 substantial evidence in the case record,” thus, it should have been given
13 controlling weight. *Orn*, 495 F.3d at 631. At the time of his report finding Plaintiff
14 unable to work, Dr. Crank noted positive objective findings including a bilateral
15 positive straight leg test, decreased range of motion, tenderness and palpitation in
16 the spine, and crepitus of the cervical spine. Additionally, imaging ordered by Dr.
17 Crank confirmed that Plaintiff suffers multilevel degenerative disc disease and
18 degenerative facet arthrosis of the lower lumbar spine, spondylosis of the
19 thoracolumbar spine, and cervical facet arthrosis most prominent at the C7-T1
20 level. A subsequent physical therapy evaluation found that Plaintiff demonstrated
21 decreased thoracic range of motion, decreased thoracic extensor strength, upper
22 crossed syndrome, right rotation in the T4-T8 and left rotation in the T9 vertebrae,
23 and decreased right upper extremity strength. These evaluations are consistent
24 with Dr. Crank’s opinion. Because Dr. Crank’s opinion is supported by medically
25 acceptable techniques and consistent with substantial evidence in the record, it
26 was error for the ALJ not to give his opinion controlling weight.

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1 b. Philip G. Barnard, Ph.D.

2 Dr. Barnard performed a psychological evaluation on Plaintiff in March of
3 2014. He diagnosed Plaintiff with Other Specified Schizophrenia Spectrum and
4 Other Psychotic Disorder with persistent auditory hallucinations. He found that
5 Plaintiff would have moderate limitations in communicating and performing
6 effectively in a work setting; completing a normal work day and work week
7 without interruptions from psychologically based symptoms; and the ability to
8 maintain appropriate behavior in a work setting. Moderate limitation is defined as
9 “significant limits on the ability to perform one or more basic work activit[ies].”
10 AR 519. Consequently, Dr. Barnard determined that Plaintiff’s auditory
11 hallucinations would affect his ability to work on a daily basis to a mild extent.
12 The ALJ accorded Dr. Barnard’s opinion some weight as consistent with his
13 objective findings and treatment records from the Central Washington
14 Comprehensive Mental Health Clinic. The ALJ determined that the record
15 demonstrates that Plaintiff’s symptoms are well managed with psychotropic
16 medication and outpatient behavioral therapy.

17 The ALJ also gave some weight to the medical opinion of Aaron Burdge,
18 Ph.D. who examined Plaintiff in February 2013, prior to Plaintiff’s alleged onset
19 date. Dr. Burdge diagnosed Plaintiff with polysubstance dependence and pain
20 disorder associated with both psychological factors and a general medical
21 condition. He assessed Plaintiff with a Global Assessment of Functioning (“GAF”)
22 score of 70; this score is indicative of mild symptoms of difficulty in social and
23 occupational functioning. Yet, Dr. Burge found no significant limit on the ability
24 of Plaintiff to perform work activities. Plaintiff’s Personality Assessment
25 Inventory (“PAI”) test results also suggested significant thinking, concentration,
26 and social interaction and judgment problems. Again, Dr. Burdge found no
27 limitations.

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1 It is apparent from the ALJ's decision that Dr. Burdge's medical opinion
2 was favored over Dr. Barnard's. This was error. "Generally, the more consistent a
3 medical opinion is with the record as a whole, the more weight [the SSA] will give
4 to that medical opinion." 20 C.F.R. § 416.927. Dr. Burdge's opinion, unlike that of
5 Dr. Barnard is not only internally inconsistent, it is inconsistent with the record as
6 a whole. While Dr. Burdge acknowledged that Plaintiff's GAF score is indicative
7 of mild symptoms of difficulty in social and occupational functioning, he found no
8 or mild limitations on Plaintiff's ability to work. A mild limitation is one that does
9 not significantly limit the ability of Plaintiff to work. This finding is inconsistent
10 with Plaintiff's auditory hallucinations and GAF score. The ALJ focuses on Dr.
11 Burdge's opinion that Plaintiff may not have answered PAI questions in a
12 forthright manner as his responses to some particular items were idiosyncratic.
13 However, Dr. Burdge does not specifically identify why he believes that Plaintiff
14 was less than forthright in his responses. The PAI results suggest a person with
15 significant thinking and concentration problems; this is consistent with Plaintiff's
16 testimony and the record as a whole. Moreover, Dr. Burdge's opinion was
17 rendered prior to Plaintiff's alleged onset date and not is dispositive of disability.

18 Dr. Barnard, on the other hand, found significant limits on the ability of
19 Plaintiff to perform one or more basic work activities. This opinion is consistent
20 with the record and Plaintiff's testimony, which was improperly discredited by the
21 ALJ. Plaintiff testified that he frequently experiences auditory hallucinations; he
22 hears people talking to him that are not physically present. He must write down
23 steps in order to accomplish a task or he will be distracted by voices; he feels like
24 these voices are trying to control his life. Plaintiff's testimony is supported by
25 Frank Garner, M.D.'s psychiatric evaluation wherein he noted that Plaintiff was
26 "clearly interrupted from time to time from commentary voices that are ongoing."
27 He prescribed Haloperidol, an antipsychotic used to treat hallucinations. Plaintiff
28

1 testified that the medication has helped, but he still experiences auditory
2 hallucinations.

3 For the reasons stated above, the ALJ improperly discounted the opinion of
4 Dr. Barnard in favor of Dr. Burdge. Dr. Barnard's opinion should have been given
5 more weight as it is consistent with the record as a whole. *See* 20 C.F.R. § 416.927.

6 c. James Bailey, Ph.D.

7 Dr. Bailey examined Plaintiff of behalf of the Washington State Department
8 of Social and Health Services ("DSHS"). In March 2013, Dr. Bailey determined
9 that Plaintiff was under a disability beginning on September 1, 2012 with mild
10 limitations. There is no evidence of record that the ALJ considered Dr. Bailey's
11 opinion.

12 The Ninth Circuit has held that findings of disabilities of other federal
13 agencies must be considered in the ALJ's decision and are entitled to some weight,
14 particularly with regard to the Department of Veterans Affairs ("VA"). *McCartey*
15 *v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). "[A]lthough a VA rating of
16 disability does not necessarily compel the [Social Security Administration
17 ("SSA")] to reach an identical result, 20 C.F.R. § 404.1504, the ALJ must consider
18 the VA's finding in reaching his decision," given the "marked similarity between
19 these two federal disability programs." *Id.* at 1076. Plaintiff contends that the ALJ
20 should have considered DSHS's, a state agency, disability determination. However,
21 Plaintiff has offered no evidence or specific argument regarding the similarity
22 between DSHS and the SSA. Therefore, the Court declines to hold that the ALJ
23 erred in failing to consider Dr. Bailey's evaluation. *See Ledoux v. Astrue*, No.
24 3:10-cv-05858-KLS, 2011 WL 5023393 (W.D. Wash. Oct. 18, 2011). However,
25 Dr. Bailey's assessment is persuasive evidence that Plaintiff has been under a
26 disability.

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1 In sum, the ALJ reversibly erred in failing to give Dr. Crank's opinion
2 controlling weight and discounting the opinion of Dr. Barnard in favor of Dr.
3 Burdge.

4 *2. Whether the ALJ committed reversible error by discrediting Plaintiff.*

5 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
6 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
7 evidence of malingering, the ALJ must give "specific, clear and convincing
8 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v.*
9 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted). If the ALJ's
10 credibility finding is supported by substantial evidence in the record, the
11 reviewing court "may not engage in second-guessing." *Thomas v. Barnhart*, 278
12 F.3d 947, 959 (9th Cir. 2002).

13 In recognition of the fact that an individual's symptoms can sometimes
14 suggest a greater level of severity of impairment than can be shown by the
15 objective medical evidence alone, 20 C.F.R. §§ 404.1529(c) and 416.929(c)
16 describe the kinds of evidence, including the factors below, that the ALJ must
17 consider in addition to the objective medical evidence when assessing the
18 credibility of an individual's statements:

- 19 1. The individual's daily activities; 2. The location, duration,
20 frequency, and intensity of the individual's pain or other symptoms;
21 3. Factors that precipitate and aggravate the symptoms; 4. The type,
22 dosage, effectiveness, and side effects of any medication the
23 individual takes or has taken to alleviate pain or other symptoms;
24 5. Treatment, other than medication, the individual receives or has
25 received for relief of pain or other symptoms; 6. Any measures other
26 than treatment the individual uses or has used to relieve pain or other
27 symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20
28 minutes every hour, or sleeping on a board); and 7. Any other factors
concerning the individual's functional limitations and restrictions due
to pain or other symptoms.

1 SSR 96-7P, 1996 WL 374186. Daily activities may be grounds for an adverse
2 credibility finding if (1) Plaintiff's activities contradict his other testimony, or (2)
3 Plaintiff "is able to spend a substantial part of his day engaged in pursuits
4 involving the performance of physical functions that are transferable to a work
5 setting." *Orn*, 495 F.3d at 639 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
6 1989))

7 The ALJ found Plaintiff only partially credible. In the opinion the ALJ
8 found that Plaintiff's medically determinable impairments could reasonably be
9 expected to cause some of the alleged symptoms. However, the ALJ stated that
10 Plaintiff's statements concerning the intensity, persistence, and limiting effects are
11 not entirely credible. The ALJ gave the following reasons: (1) Plaintiff's work
12 history suggests that his present unemployment is not due to his medical
13 impairments; (2) Plaintiff described daily activities that are not limited to the
14 extent one would expect; and (3) Plaintiff has made inconsistent statements
15 regarding matters relevant to the issue of disability. For the reasons discussed
16 herein, the ALJ's credibility determination was made in error.

17 First, the ALJ properly notes that Plaintiff's work history is not entirely
18 verifiable because most of his work was done "under the table." Despite an
19 unverified work history, the ALJ found that Plaintiff's work history suggests that
20 his present unemployment is not due to medical impairments, but rather lack of
21 available work. The record simply does not support this conclusion. Plaintiff
22 testified at the hearing that he applied for Social Security benefits in August 2013
23 because he was unable to meet the demands of an employer. In his Disability
24 Report, Plaintiff indicated that he stopped working in January 2011 "[b]ecause of
25 other reasons." AR 197. He reported that he left his full-time job in 2005 due to
26 lack of work but continued working on a temporary basis until 2011. From 2005
27 through 2011 Plaintiff testified that his girlfriend took care of him with settlement
28 money she had received and he would put ads on Craigslist to work as a handyman

1 in the interim. Nothing in the record suggests that Plaintiff stopped working in
2 2011 due to lack of available work rather than medical impairments and it was
3 error for the ALJ to find to the contrary.

4 Second, the ALJ determined that Plaintiff's daily activities are not limited to
5 the extent one would expect. Specifically, the ALJ noted that Plaintiff provides all
6 of his self-care needs, does household chores and cleaning, manages his financial
7 and medical affairs, and takes care of pets on a daily basis. The Ninth Circuit has
8 "warned that ALJs must be especially cautious in concluding that daily activities
9 are inconsistent with testimony about pain, because impairments that would
10 unquestionably preclude work and all the pressures of a workplace environment
11 will often be consistent with doing more than merely resting in bed all day."
12 *Garrison*, 759 F.3d at 1016. Recognizing that claimants should not be penalized
13 for attempting to lead their normal lives, "only if Plaintiff's level of activity is
14 inconsistent with his claimed limitations would these activities have any bearing
15 on his credibility." *Id.* Plaintiff's testimony regarding his daily activities is
16 consistent with his limitations.

17 Plaintiff testified that he can do light chores for a few hours a day but must
18 lay down and elevate his feet on the couch for thirty minutes at a time for
19 approximately five or six hours in an eleven-hour day. Standing or sitting are
20 painful. Plaintiff also experiences auditory hallucinations that make chores
21 difficult. He has difficulty controlling his thoughts and has to write down the steps
22 it takes to complete a task or finish a recipe; another voice tells him what he
23 should be doing. Plaintiff does take care of two horses but testified that he must
24 take frequent breaks to elevate his feet when grooming and feeding them. He
25 requires that hay be delivered because he cannot load or unload it anymore. In
26 feeding, Plaintiff carries flakes to the horses after the hay is unloaded; a flake
27 weighs approximately five or seven pounds. While Plaintiff is able to complete
28 certain daily tasks, "the mere fact that a plaintiff has carried on certain daily

1 activities, such as grocery shopping, driving a car, or limited walking for exercise,
2 does not in any way detract from [his] credibility as to [his] overall disability. One
3 does not need to be ‘utterly incapacitated’ in order to be disabled.” *Vertigan v.*
4 *Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (citing *Fair v. Bowen*, 885 F.2d 597,
5 603 (9th Cir. 1989)). Plaintiff’s testimony is consistent with his claimed
6 limitations and the ALJ erred in discrediting Plaintiff on this ground.

7 Third, the ALJ noted inconsistencies in Plaintiff’s statements. The ALJ
8 mistakenly states that Plaintiff indicated to Dr. Burdge on February 17, 2013 that
9 he experienced no mental health problems, yet on February 8, 2013 informed Dr.
10 Crank that he experienced auditory hallucinations. In actuality, Plaintiff saw Dr.
11 Brudge on February 7, 2013, before he saw Dr. Crank. Nevertheless, Dr. Burdge’s
12 evaluation of Plaintiff revealed positive answers for delusions and hallucinations,
13 including that Plaintiff hears voices that no one else can hear. Any inconsistency
14 here is inconsequential and insufficient to discredit Plaintiff’s testimony.

15 The record simply does not support the ALJ’s credibility determination.
16 Plaintiff’s testimony regarding his daily activities is consistent with his testimony
17 about his functional limitations, particularly in regard to his back and neck pain
18 and auditory hallucinations. There is nothing in the record to suggest that Plaintiff
19 stopped working in 2011 due to lack of work and any inconsistency in his
20 statements to treatment providers are inconsequential. Because the ALJ did not
21 provide specific, clear, and convincing reasons for rejecting a claimant’s
22 subjective symptom testimony, the ALJ committed reversible error.

23 *3. Whether the ALJ committed reversible error by failing to consider Plaintiff’s*
24 *mental impairments and obesity as medically-determinable severe impairments.*

25 Plaintiff submits that the ALJ erred by failing to consider Plaintiff’s mental
26 impairments and obesity as medically-determinable severe impairments. However,
27 the Court need not consider the issue. Had the ALJ properly gave controlling
28 weight to Dr. Crank’s medical opinion and properly credited Dr. Barnard’s

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1 medical opinion and Plaintiff's symptom testimony, Plaintiff would have been
2 found disabled within the meaning of the Social Security Act.

3 **Conclusion**

4 Here, the ALJ erroneously rejected medical opinion evidence and Plaintiff's
5 symptom testimony; if this evidence had been properly credited, Plaintiff would
6 have been found disabled. A review of the record as a whole, including the
7 testimony of the vocational expert in concert with the properly-credited opinions
8 of Dr. Crank and Dr. Barnard, creates no legitimate doubt that Plaintiff is disabled
9 within the meaning of the Social Security Act. Further administrative proceedings
10 will not be useful and there are no outstanding issues to consider. *Treichler v.*
11 *Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1105 (9th Cir. 2014). Consequently,
12 the proper remedy is to remand for a calculation and award of appropriate benefits.
13 *Garrison*, 759 F.3d at 1019-20.

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**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
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JUDGMENT + 18**

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, ECF No. 12, is **GRANTED**.

2. Defendant's Motion for Summary Judgment, ECF No. 13, is **DENIED**.

3. The decision of the Commissioner denying benefits is **reversed** and **remanded** for an award of benefits, with a disability onset date of February 15, 2013.

4. The District Court Executive is directed to enter judgment in favor of Plaintiff and against Defendant.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order, provide copies to counsel, enter judgment, and close the file.

DATED this 3rd day of September 2017.



A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Stanley A. Bastian
United States District Judge